82-976

Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82 -

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

GEORGE DEUKMEJIAN, Attorney
General of the State of
California
ROBERT H. PHILIBOSIAN, Chief
Assistant Attorney General,
Criminal Division
ARNOLD O. OVEROYE
Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General
EDDIE T. KELLER
Deputy Attorney General
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 445-6360

Attorneys for Petitioner

QUESTION PRESENTED

When the police have probable cause to arrest a suspect, are Miranda warnings required when that suspect voluntarily appears at a police station and confesses to a crime during a short interview in which no "indicia of arrest" are present and after which the suspect is allowed to leave the station?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CONSTITUTIONAL PROVISIONS INVOLVED	iv
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
A. Proceedings in the State Court	3
B. Statement of the Facts	5
ARGUMENT	14
THE LOWER COURT'S REVERSAL OF RESPONDENT'S MURDER CONVICTION FOR MIRANDA ERROR, DESPITE ITS FINDING THAT NO "INDICIA OF ARREST" WERE PRESENT WHEN RESPONDENT CONFESSED, IS BASED ON AN UNWARRANTED INTERPRETATION OF MIRANDA V. ARIZONA	14

TABLE OF CASES CITED

	Page
Barfield v. Alabama (5th Cir. 1977) 552 F.2d 1114, 1118	32
Beckwith v. United States (1976) 425 U.S. 341, 345	15
Fare v. Michael C. (1978) 442 U.S. 707, 718	23
Fare v. Michael C. 439 U.S. 1310, 1314 (Rehnquist, J., Circuit Justice	23
Haynes v. Washington (1963) 373 U.S. 503, 513-514	20
Miranda v. Arizona (1966) 384 U.S. 436	4
Oregon v. Mathiason (1976) 429 U.S. 494 (per curiam)	14
People v. Herdan (1974) 42 Cal.App.3d 300; 116 Cal.Rptr. 641	15
People v. P. (N.Y. App. 1967) 21 N.Y. 2d 1, 286 N.Y.S.2d 225, 230, 233 N.E.2d 255	26
Rhode Island v. Innis (1970) 446 U.S. 291, 301	25

TABLE OF CASES CITED, CONT'D

	Page
United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 373	27
United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145 & fn. 7)	27

STATUTES CODES AND OTHER AUTHORITIES

28 United States Code § 1257(3)	2
California Rules of Court Rule 24(a)	2
28	2
California Codes Penal Code § 187	3
§ 190.2(a)(17)(i)	3
§ 211	3
§ 664	3
§ 12022(a)	3

TABLE OF CASES CITED, CONT'D

Page

MISCELLANEOUS

2 W. Ringel, Search, Seizures, Arrests, and Confessions (2d ed 1980) § 27.2 at p. 27.3 15

Woodard, Custodial Interrogation after Oregon, Mathiason, 1978 Duke L. J. 1497, 1508-1509, 1519 15

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

No. 82

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROSCOE HOWARD, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIFTH APPELLATE DISTRICT

OPINION BELOW

The opinion of the California Court of Appeal, Fifth Appellate District, an unpublished 1982 decision numbered 5 Crim. 5181, appears as Appendix "A" to this Petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on July 16, 1982. The Court of Appeal denied respondent's petition for rehearing on August 5, 1982 (Appendix "B"). The decision became final as to that court on August 15, 1982 (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on September 29, 1982 (Appendix "C"). The remittitur issued on October 1, 1982 (Appendix "D").

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Howard was convicted by jury in the Superior Court of the State of California, in and for the County of Tulare of crimes in two counts: first degree murder with one special circumstance (attempted robbery) and attempted robbery. In conjunction with both counts, the jury found that a principal was armed with a firearm. (Cal. Pen. Code, §§ 187, 190.2(a)(17)(i), 211, 664, and 12022(a).) (CT 116-117, 204-206).

Upon conviction, the Superior Court committed respondent Howard to life imprisonment without the possibility of parole with a concurrent sentence of two years for attempted robbery

and one year for the firearm enhancement. (CT 209-212.)

The Court of Appeal of the State of California, Fifth Appellate District, by unpublished decision filed July 16, 1982, reversed respondent's judgment of conviction on all counts. The State Court held that respondent was not properly advised of his constitutional rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436 prior to making a confession on February 21, 1980. (Appendix "A".)

The respondent's petition for rehearing was denied on August 5, 1982. (Appendix "B".) A petition for hearing was denied by the California Supreme Court on September 29, 1982 (Appendix "C".)

B. Statement of the Facts

Late in the evening of February 20, 1980 Peggy Dean was senselessly murdered in the parking lot of a liquor store in Bakersfield, California.

Subsequently that night, Deputy Sheriff Lantz was dispatched to a nearby residence where he contacted a witness, Jerry Beheler. Beheler informed the deputy that he, the respondent, and another man named Daniel Chavez were present when Beheler's half-brother, Danny Wilbanks, shot Dean (RT 4-6, 10, 12, 14, 17.)

Lantz was instructed to transport Beheler to the sheriff's office. The deputy told Beheler that he was not under arrest (R.T. 7, 14-15).

At Lantz's request, Beheler directed him to respondent's and Chavez's residence. No one answered respondent's door, but Lantz did contact Chavez's father. The deputy told the senior Chavez that he wanted to speak to his son as soon as possible since he had information that the young Chavez was present at a shooting (RT 8-9, 15-17).

Later, during the early morning hours of February 21, Detective Del Ray taped an interview with Beheler in which Beheler told him that he, respondent, Chavez, and Wilbanks went to the liquor store to rob Dean of narcotics and that respondent provided a gun to Wilbanks for that purpose. After the shooting, respondent and Chavez fled home and Wilbanks left town (RT 31, 33-34).

During the interview, Beheler was neither arrested nor restrained. He was allowed to leave when the interview was over. Ray asked him to tell respondent and Chavez to contact the sheriff's department if possible. Ray considered respondent a "possible suspect." (RT 20, 32, 35, 37-38.)

At the same time, respondent and Chavez contacted Chavez's father. They had been hiding in respondent's home. The elder Chavez told them that the police said they were just "running scared" and that they just wanted to talk to them. (RT 54, 59, 69-71, 74.)

Later that day, Beheler called the two and advised them that he had told the police "everything." He encouraged them to call Ray because the police only wanted statements and were

after Wilbanks. Beheler counseled them not to worry about cooperating with the police, since he had been freed after his interview. He told them that he was out and they would be out too (RT 50-51, 65, 71-74).

After the telephone conversation, respondent and Chavez concluded that they would also be freed after they talked to the police. Chavez called Ray and told him that they had heard the police wanted to talk to them and were willing to come to the sheriff's department, but they had no transportation. Ray offered to provide transportation to the sheriff's department. Chavez did not expect to be put in jail and assumed that he and respondent would be transported home. (RT 21, 37, 47, 65-66, 68-69, 72-73, 85-87, 90-91.)

At 1:21 p.m. on February 21, Ray taped a twelve-minute interview with the respondent. The interview occurred in a "fairly small" interview room at the sheriff's office. Another deputy was also present. Respondent told the investigator that he had provided the gun with which Wilbanks had shot Dean. He was neither arrested nor restrained. No Miranda warnings were given. (RT 22, 32, 42).

During the interview, respondent also explained that he had decided to contact Ray because Beheler had told him to. (CT 30.)

Respondent was neither restrained nor arrested. He expressed no desire to end the interview or police contact. At the end, Ray advised him

that the district attorney would evaluate the tapes, and that he might be contacted later (RT 22-23, 42-43, 45).

After Chavez's interview, Ray requested them both to stay around town as witnesses. They were furnished transportation home. Other than Ray's request, no other measures were taken to ensure that respondent and Chavez would stay in the area (RT 24, 46-47,67, 88-89).

On February 26, respondent was arrested and taped again by Detective Ray (RT 25-27). During that interview the following exchanges occurred:

"Q. (Ray) ROSCOE, this is my, uh, or this will be my, my second interview with you.

"A. (Respondent) Right.

"Q. On 2-21-80, of this year, you voluntarily came to the Sheriff's Office and gave a statement regarding this offense. You were not in custody at that time and, uh, you were, uh, furnished transportation back to your residence after the interview was over, is that right?

"A. That's right.

"Q. OK, now for the second interview, things have, uh, have changed, at this time you are in custody.

"A. Um hmm. (CT 32.)

Respondent was then advised of his constitutional rights. He waived his rights, agreed to talk, and gave Ray essentially the same information he had before. The following exchange then occurred:

"Q. (Ray) OK, then it was the next day that, uh, you guys voluntarily came down to the office and gave your statements.

"A. (Respondent) Um hmm.

"Q. And like I said before, at that time you were not in custody.

"A. Um hmm.

Q. And you were returned to your homes and at that time I, before you left the office here I told you that these statements would be taken to the District Attorney's Office for their evaluation.

"A. Um hmm.

"Q. But their action I couldn't say at that time and during . . . during that first contact with you and, and this interview also, at

anytime did I make any threats or promises to you?

"A. No, no you did not.

"Q. And, now before I conclude this statement, do you have anything that you want to add?

"A. Umm, no, not as of this time, hmm um." (CT 38.)

The trial court granted the People's motion to admit the tape recording of respondent's February 21 interview (CT 85-92, RT 111).

REASONS FOR GRANTING WRIT

ARGUMENT

THE LOWER COURT'S REVERSAL OF RESPONDENT'S MURDER CONVICTION FOR MIRANDA ERROR, DESPITE ITS FINDING THAT NO "INDICIA OF ARREST" WERE PRESENT WHEN RESPONDENT CONFESSED, IS BASED ON AN UNWARRANTED INTERPRETATION OF MIRANDA V. ARIZONA

The California Fifth District Court of Appeal's reversal of respondent's convictions for murder and attempted robbery on the ground that he was not advised of his constitutional rights prior to confessing on February 21 is directly contrary to this Court's decision in Oregon v. Mathiason (1976) 429 U.S. 494 (per curiam). The appellate court's conclusion that respondent was "in custody" at the time he confessed and should have been advised of his rights pursuant to Miranda v. Arizona, supra, 384 U.S. 436

is yet another example of a lower court's reluctance to abide by this Court's scrupulous regard for the "explicitly stated rationale" of Miranda. (Beckwith v. United States (1976) 425 U.S. 341, 345; 2 W. Ringel, Searches, Seizures, Arrests, and Confessions (2d ed. 1980) § 27.2 at p. 27.3; Woodard, Custodial Interrogation after Oregon, Mathiason, 1978 Duke L. J. 1497, 1508-1509, 1519.)

In reaching its decision the lower court correctly noted that the mere fact that respondent's interview occurred at the police station did not justify requiring that he be advised of his Miranda rights. To make that determination, the court relied on another California case, People v. Herdan (1974) 42 Cal.App.3d 300, and

examined three additional factors: (1) whether or not investigation had focused on respondent; (2) whether objective "indicia of arrest" were present during the interview; and (3) the length and nature of the questioning. (Appendix "A" at pp. 14-25.)

The court then found, based on its "independent review" of the record, that the police had "focused" suspicion on the respondent and had probable cause to arrest him. It also concluded that the questioning of respondent was an interrogation. However, the court also held that "indicia of arrest" were not present during respondent's February 21 interview. Nevertheless, based on the presence of the other "factors," the court held that respondent was "in custody" at the time of his stationhouse

confession. (Appendix "A" at pp. 25-35.)

Petitioner submits that the appellate court's analysis and result is patently contrary to the United States Supreme Court's decision in Oregon v. Mathiason, supra. In that case, based on facts very similar to the facts in the instant case, the high court concluded that the defendant was not "in custody" and did not have to be advised of his Miranda rights.

In Mathiason, a burglary suspect responded to a request that he contact the police. He agreed to talk to an investigator at the police station. When the suspect arrived the investigator advised him he was not under arrest. They entered an office, closed the door, and sat down across a

desk from each other. The investigator explained that he believed the suspect was involved in a burglary and falsely stated that his fingerprints had been found at the scene. A few minutes went by and the suspect admitted taking the property. After being advised of his Miranda rights, the suspect gave a taped confession. Afterwards, the officer reiterated that the suspect was not under arrest and that he was released to work and be with his family. He also told the suspect that the district attorney would consider whether or not to file charges. (Oregon v. Mathiason, supra, 429 U.S. at 493-494.)

The Oregon Supreme Court reversed the defendant's conviction since he had been interrogated in a "coercive environment" without being

advised of his Miranda rights. (Id. at p. 494.)

This Court reversed the Oregon court. In its decision, this Court iterated that the warnings required by Miranda v. Arizona do not apply to every encounter between the police and a suspect. (Ibid.) Rather, the Miranda requirements are limited to interrogations occurring after a person has been taken into custody or otherwise deprived of freedom in a significant way. (Ibid.) In the absence of a "formal arrest or restraint of any movement," other factors such as the location of the questioning, the level of suspicion, and the nature of the questioning do not trigger Miranda warnings. (Id. at p. 495.) Thus, Miranda only applies to the "coercive environment" inherent in

the situation in which a suspect's freedom has been restricted to the point of being "in custody." (Ibid.)

Mathiason reflects this Court's punctilious regard for the precise dictates of Miranda v. Arizona, supra. The latter case carved out a special exception to the constitutional test of admissibility for confessions and admissions. (Miranda v. Arizona, supra, 384 U.S. at 457.) Prior to Miranda, the court examined the "totality of circumstances" surrounding a confession to determine if it was freely and voluntarily given without compulsion or inducement. (See, e.g., Haynes v. Washington (1963) 373 U.S. 503, 513-514.) In Miranda, the court held that a confession resulting from "custodial interrogation" would be

inadmissible unless the prosecution demonstrated the use of procedural safeguards effective to secure a suspect's privilege against self-incrimination. (Miranda v. Arizona, supra, at 444, 457, 478.)

The court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, supra, 384 U.S. at 444.) Essentially, this was a situation in which suspicion had focused on a person to the point that the authorities had chosen to restrain that person for further questioning. (Id. at p. 444, fn. 4.)

The court reasoned that no confession resulting from such questioning could truly be the product of free choice absent "adequate protective devices." (Id. at p. 458.) During such encounters, a suspect is involuntarily held, controlled, or confined and subjected to the anxieties of a persistent and prolonged pressure to confess in an intimidating "police-dominated atmosphere" that suggests the "invincibility of the forces of the law" and "the complete subjugation of the suspect to the will of the examiner." (Id. at pp. 446-457.) Confessions under such circumstances are inherently compelled absent evidence that the interrogators have taken "appropriate safeguards at the outset of the interrogation to insure that the statements were truly

the product of free choice." (Id. at p. 458.) The "core virtue" of the Miranda decision was its simplicity and precision in instructing the police and courts on the conduct of "custodial interrogations." (Fare v. Michael C. (1978) 442 U.S. 707, 718; Fare v. Michael C. 439 U.S. 1310, 1314 (Rehnquist, J., in chambers; Miranda v. Arizona, supra, at 468.)

Mathiason meticulously preserves and confines Miranda's application to only the most intense of encounters between investigators and an accused -- the interrogation of a suspect who has been involuntarily held, controlled, or confined by the authorities and whose freedom to depart is restricted in a significant way. Miranda was not meant to exclude admissions and confessions

made by a suspect, such as respondent in this case, who voluntarily appears at the police station and willingly answers police questions without being placed in custody. The police do not have to stop a person who wishes to confess to a crime. (Miranda v. Arizona, supra, 384 U.S. at 478.) Such encounters are of a lesser scale and do not inherently nullify a person's will to resist or freedom of choice.

Yet, despite the similarities between Mathison and the instant case, the lower court came to the opposite conclusion. Its analysis requires police officers to consider immaterial factors rather than simply relying on whether or not a suspect was actually in custody. The result is the exclusion of evidence voluntarily provided by the

respondent without being subjected to the "inherent coercion" or "overwhelming compulsion" of a Miranda-type custodial interrogation.

In assessing whether respondent was in custody on February 21, the appeals court found it significant that he was subjected to an "interrogation" as that term is defined in Rhode Island v. Innis (1979) 446 U.S. 291, 301. However, Mathiason clearly rejects such an analysis. The fact that the investigator in Mathiason told the defendant that he suspected his guilt and then, falsely, told him that his fingerprints had been found at the scene had "nothing to do" with custody. (Oregon v. Mathiason, supra, 429 U.S. at 495-496.) Any interview with an officer who suspects the interviewee's guilt will

have its "coercive aspects," but that does not trigger the Miranda requirements. (Id. at 495; People v. P. (N.Y. App. 1967) 286 N.Y.S.2d 225, 230.) An "interrogation" cannot "bootstrap" the status of a suspect to that of "custody."[1/]

The lower court also gave "great weight" to the fact that the "focus" of investigation had fallen on respondent and that there was "probable cause" to arrest him at the time of the interview on February 21. However, the Miranda requirements are not to be imposed simply because "the questioned

---

1. Rhode Island v. Innis, supra itself states that "custody" and "interrogation" are separate concepts. Where custody is conceded, the court must determine independently whether the suspect was interrogated. (Id. at p. 300.)

person is one whom the police suspect." (Oregon v. Mathiason, supra, 429 U. S. at 495.) Indeed, this Court in Beckwith v. United States, supra, 425 U.S. at 346 cited with approval the following language from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473:

> "'It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questioning.'"

(See also United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145 & fn. 7 and cases cited therein.)

Indeed, to rely merely on "probable cause to arrest" in determining "custody" is contrary to the express language of the Miranda decision.[2/] In its opinion, this Court explicitly stated that by "focus of suspicion" it meant that a person had been interrogated after being "taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, supra, 384 U.S. at 444, fn. 4.) (Emphasis added.) The use of the word "significant" is not mere surplusage. (See People v. P.,

---

2. Rhode Island v. Innis, supra, 446 U.S. at 301 emphasizes that the Miranda safeguards were "designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (Emphasis added.)

supra, 286 N.Y.S.2d at 234.) To require that the Miranda warnings be given whenever an officer has probable cause to arrest, is to render the "deprivation of freedom" language meaningless. Just because an investigator has probable cause to arrest does not mean that a suspect is automatically being subjected to the anxieties and inherent coercion of being involuntarily held by the police. Surely, the respondent in this case, who was not restrained and never lead to believe that his freedom of depart was restricted in any way, was not under such compulsion.

In short, Mathiason holds that neither "focus of suspicion" nor the nature of the questioning alone or in combination are sufficient to render a suspect "in custody", absent other

evidence of "significant" restraint. As the appeals court opinion itself concedes, such other restraint was absent in this case.

The court in this case specifically found that no "objective indicia of arrest" were present at the time of respondent's interview. In making its finding, the court considered factors similar to those considered by the Supreme Court in Mathiason in determining whether or not the defendant in that case was "in custody."

The respondent voluntarily contacted the police and went to the station house at the request of the investigator. He believed that he would not be held in custody due to the experience of his accomplice, Beheler. He was interviewed for only twelve

minutes and did in fact leave the station without hindrance. When he was interviewed after his arrest a few days later, he agreed that he had voluntarily consented to his interview on February 21 and was not in custody during that interview. His experience did not approach the level of inherent coercion evident in a true "custodial investigation."

One obvious difference in the facts between Mathiason and the instant case is that the respondent was never told explicitly that he was not under arrest. However, the record shows that the respondent contacted the investigator because he believed he would not be held in custody. In any event, it is not required that an officer inform suspects whether or not they are under

arrest. (See, e.g., Barfield v. Alabama (5th Cir. 1977) 552 F.2d 1114, 1118.)

Under these circumstances, the facts in the instant case are even more compelling than the facts in Mathiason that "there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way." (Oregon v. Mathiason, supra, 429 U.S. at 495.)

The flaw in the appellate court's decision in the instant case stems from its reliance on another California appellate decision in People v. Herdan, supra, 42 Cal.App.3d at 307, a decision which obviously predates the United States Supreme Court's decision in Oregon v. Mathiason, supra. Herdan set forth a "four-factor" analysis to determine whether or not custody has

attached in situations in which an arrest has not yet taken place. These factors are:

> "(1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning." [Fns. omitted.]

The Herdan analysis does not conform to the dictates of Miranda v. Arizona, supra. (Oregon v. Mathiason, supra, 429 U.S. at 495.) In fact, it is remininscent of the "coercive environment" analysis rejected in Mathiason. Therefore, opinions such as the one in the instant case needlessly hamper law enforcement by perpetuating an erroneous approach in

determining the point of time at which Miranda warnings are required.

Furthermore, the "core virtue" of Miranda -- its establishment of clear, precise, and specific guidelines is eviscerated by requiring investigating officers to assess and weigh a variety of immaterial factors. Miranda's promise that its requirements would not "constitute an undue interference with a proper system of law enforcement" (384 U.S. at 481) is broken. The prosecution is deprived of relevant, valuable, and constitutionally admissible evidence.

The reversal of respondent's conviction in the instant case loosens Miranda from its "doctrinal moorings." (Fare v. Michael C., supra, 439 U.S. 1310, 13114 (Rehnquist, J., Circuit

Justice.) Respondent voluntarily came to the police station and left after a twelve-minute interview. He never believed he was in custody and nothing about the interview indicated that his freedom to depart was limited in any significant way. The reviewing court concluded that no indicia of arrest were present. Yet, the Fifth District Court of Appeals has imposed a Miranda requirement based on other factors which have nothing to do with whether or not the respondent was subjected to the persistent pressure of an actual "custodial interrogation." The court's decision results in the potential release of a professed murderer. It contributes nothing toward protection of the rights of the accused since it requires

Miranda admonitions in noncustodial, non-coercive contexts that do not suggest the "invincibility of the forces of the law" nor "the complete subjugation of the individual to the will of his examiner." (Miranda v. Arizona, supra, 384 U.S. at 450, 457.)

///

///

///

///

///

///

///

///

///

///

///

///

///

Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Fifth District Court of Appeal in the State of California.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney
General of the State of
California
ROBERT H. PHILIBOSIAN, Chief
Assistant Attorney General,
Criminal Division
ARNOLD O. OVEROYE
Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General

EDDIE T. KELLER
Deputy Attorney General

Attorneys for Petitioner

ETK:dh
CR.SA82US0004
11-22-82

APPENDIX A

Copy of Opinion Issued by Fifth District Court of Appeal of the State of California in People v. Howard, 5 Crim. 5181

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim. No. 5181
Plaintiff and Respondent,	)
v.	) (Super.Ct.No. 20967)
ROSCOE HOWARD, JR.,	) O P I N I O N
Defendant and Appellant.	)

APPEAL from a judgment of the Superior Court of Kern County. Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy

Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

Appellant, Roscoe Howard, Jr., and codefendants were charged with violations of Penal Code sections 664/211 (attempted robbery) and 187 (murder). As a special circumstance it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

These are the facts:

Daniel Chavez, one of the original codefendants in appellant's case, was granted immunity and testified against appellant.

On February 20, 1980, appellant, Daniel Chavez, and Jerry Beheler drove to Beheler's Bakersfield home. Appellant had in his possession his father's 357 magnum and he agreed with the others that it would be possible to "take" some hashish from a woman at the Palms Liquor Store.

At Beheler's house, Danny Wilbanks joined the three in planning the robbery. Wilbanks began to handle appellant's gun, which had been lying on the table. He

removed the bullets from the gun, and said he only needed one bullet, and then reloaded the gun. Appellant retrieved the gun, replaced it on the table, and warned Wilbanks not to play with it. Chavez and appellant wanted to use the gun to bluff the robbery victim only. However, they concurred that the gun might be necessary as protection against a friend of the woman's who had a knife.

Using Beheler's car, Wilbanks drove the other three to the liquor store. Appellant's gun rested on his lap. Appellant cautioned Wilbanks that the gun did not have a safety and that no one was to be killed. The plan was to leave if the woman did not give them the hashish.

After the three entered the store's parking lot, a woman, Peggy Dean, approached them. She stated that she had not expected them and then handed Wilbanks

a tinfoil package. She saw the gun and inquired as to its purpose. Chavez said it was for protection. She indicated she had 12 more "grams." Other foil packages were visible in her hands. Wilbanks pointed the gun at her and demanded the rest of the hashish. She said she did not think he would fire the gun. However, despite appellant and Chavez' protests, Wilbanks shot her once. The four men then drove away.

Appellant gave Wilbanks instructions on how to return to Beheler's house. Appellant also regained possession of the gun at this time. Upon their arrival at Beheler's house, appellant hid the gun in the back yard and left with Chavez through a back gate. Appellant threw the gun's remaining bullets away.

At trial Kern County Deputy Sheriff Lantz testified that he interviewed Jerry

Beheler. Beheler identified Wilbanks as the shooting perpetrator and also told the deputy he thought the gun was in his back yard. Additionally, he indicated that two other people were also present during the incident, naming appellant and Chavez.

Lantz was directed to transport Beheler to the sheriff's department. On their way, Lantz asked Beheler to point out the homes of the other two "witnesses" and Beheler complied by showing him appellant's and Chavez' homes. Lantz knocked on appellant's door, but neither appellant nor Chavez answered. Lantz then contacted Chavez' father next door and left word that the police wanted to talk to his son.

After finding the gun hidden in Beheler's back yard, sheriff's investigator Ray interviewed Beheler.

admitted he had gone to the scene of the crime in order to rob the decedent. He also stated appellant went along "for the ride" and had nothing to do with the robbery.

The next morning, at the urging of Chavez' father and Beheler, appellant and Chavez called the sheriff's department. They were transported to the sheriff's department for interviews. In this interview, appellant admitted the gun was his father's, but initially stated that he had loaned it to either Wilbanks or Beheler for target practice only. He denied any intent to rob the victim, but admitted knowing that Wilbanks planned to rob her. However, he then admitted that Beheler had wanted the gun for use in the robbery and that he (appellant) knew that. He also denied

knowing the gun's whereabouts. He further denied any knowledge of Wilbanks' apparent design to shoot the victim and maintained that he planned to contact the police despite being scared. Upon completion of the interviews, appellant and Chavez were transported back to their homes by the sheriff's department.

Appellant was arrested several days later. At this time he was given his Miranda rights and was re-interviewed. He told Detective Ray that he and Beheler had procured the gun from appellant's house to rob the victim. Appellant and Chavez agreed only to use the gun as a bluff. He admitted that he and Chavez had hidden the gun.

An autopsy revealed that Peggy Dean died of a gunshot wound to the head.

Appellant testified in his own behalf.

He claimed he was just going along for the ride the night Danny Wilbanks shot Peggy Dean. He denied any complicity in her murder and any knowledge of Wilbanks's actual intent to rob her, but admitted his participation in discussion of a plan to rob her by bluffing with his father's gun. He admitted assisting in hiding the gun and bullets.

At trial, the People moved for admission of appellant's statements made to a sheriff's investigator on February 21 and 26, 1980. A hearing on this motion was held and the court granted the motion to admit appellant's statements. The facts developed at this hearing are as follows:

On February 20, 1980, Kern County Deputy Sheriff Lantz responded to a call at Palms Liquor Store in Bakersfield. Upon his arrival he found the body of the decedent, Peggy Dean. Lantz was directed

by the desk officer to a home about a block and a half away from the liquor store. Lantz talked to Jerry Beheler.

Beheler told Lantz that his half-brother, Danny Wilbanks, shot Dean. He knew where the gun was, but did not explain how Wilbanks got it. Beheler further told the officer that appellant and Chavez were also present.

Lantz was instructed to transport Beheler to the sheriff's department. He was told that he was not under arrest.

At Lantz' request, Beheler showed Lantz appellant's and Daniel Chavez' residences. No one answered the door at appellant's house, but Lantz talked to Angelo Chavez, Daniel's father, at the Chavez home. Lantz told Mr. Chavez that if he should be contacted by his son, he should tell his son to contact the sheriff's office as soon as possible as

they were interested in asking him questions because they had information his son had been present at a shooting.

Before Beheler was interviewed at the sheriff's office, sheriff's investigator Ray found a handgun hidden in Beheler's back yard.

Ray taped an interview with Beheler in which Beheler told him that he and three others, including appellant, had gone to the liquor store to rob Dean of hashish and that appellant had provided a gun to Wilbanks for that purpose. He also told Detective Ray that Chavez and appellant had left his house on foot and they seemed worried and scared.

By the end of the interview, Ray considered appellant and Beheler as possible murder suspects. Beheler was allowed to leave. He had been neither arrested nor restrained. As Beheler

left, Ray asked him to tell appellant and Chavez to contact the sheriff's department if possible.

The following day Chavez called Detective Ray and indicated that he and appellant would talk to the police. Chavez' father had urged them to call the police. Beheler also contacted them and advised them to call the police because he felt the police only wanted statements and were after Wilbanks.

Detective Ray sent a deputy to pick up appellant and Chavez at their respective residences. Ray conducted a 12-minute interview with appellant. Appellant told Ray that Beheler had gotten the gun from him to rob Peggy Dean. At that point, Ray testified that he considered appellant a suspect. This interview was taped. At no time during this interview did Detective Ray advise appellant of his Miranda

Miranda rights. After interviewing appellant and Chavez, Detective Ray released them and provided them transportation home. No arrests were made at that time. After the interview, Detective Ray told each of the individuals they should stay around town. Detective Ray indicated he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether an arrest would be made. He admitted this was not normal procedure in homicide cases.

An all-points bulletin was broadcast for the arrest of Daniel Wilbanks on February 21, 1980. Appellant, Beheler and Chavez remained at large after they had each given their taped interviews to the detectives. Later in the evening on February 21, 1980, Daniel Wilbanks turned himself in at the sheriff's office

in Lancaster. On February 25, 1980, a warrant for the arrest of the other three participants, including appellant, was issued and they were arrested on February 26, 1980. After their arrest each gave a second taped statement to the detectives. At this time each was advised of his constitutional rights. They each waived them and gave full statements concerning the instant case.

I

Appellant's primary contention on appeal is that the court erred when it admitted the statements of appellant because appellant had not been advised of his Miranda rights during the February 21st interview. Appellant contends that pursuant to Miranda v. Arizona (1966) 384 U.S. 436, appellant was in custody during the February 21st interview and thus entitled to have the Miranda admonitions. Furthermore, appellant contends

that custody arises, at the "latest," at the point when the investigating officer has probable cause to believe that the person being questioned has committed an offense. Appellant apparently contends that the police had probable cause to arrest appellant prior to the time of the February 21st interview and that consequently it was necessary that appellant be given his Miranda rights before any interrogation.

Respondent's primary argument is that appellant was not entitled to Miranda admonitions during the February 21st interview because he was not in custody.

In Miranda v. Arizona, supra, 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation

must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of

rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Also, as to conflicting testimony, the appellate courts must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753;

People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145 Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L. Ed. 2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal. Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975 15 Cal.3d 419, 443

[124 Cal.Rptr. 752, 54 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal. Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal. Cal.App.3d 300, 306-307 [116 Cal. Reptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p.

at p. 449.)" 1/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his

1/ Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App. 3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, at pp. 477-478; People v. Patterson (1979) 88 Cal. App.3d 742, 747.)

freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We must then consider the facts of the instant case in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his statement to sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694 . . . .)"

The California Supreme Court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions.

The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that the investigation had focused on the defendant, the officer did not intend

to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill, supra, 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) The United States Supreme Court has also addressed the issue of when a suspect is entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.)

Appellant in the instant case was interrogated in a small room at a police station. Two other officers were present. As stated above, usually an interrogation

at a police station is deemed inherently coercive. However, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the issue of whether appellant in the instant case was in custody during the February 21st interview will hinge on the other three factors discussed in People v. Herdan, supra, 42 Cal.App.3d 300.

(2) Whether The Investigation Had Focused On The Suspect

Appellant relies heavily on this factor. As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether an investigation has

focused on the suspect, is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21st interview, but he "apparently" contends that he was entitled to have Miranda warnings because there was probable cause to arrest him at the time of his interview. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's

Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The "police" had a substantial amount of information implicating appellant in the attempted robbery-homicide before they interviewed him on February 21st. They knew from Beheler appellant and the two others had discussed robbing the victim at Beheler's home, that appellant had furnished Wilbanks the loaded gun for that purpose, that they then drove to the liquor store to rob the victim of her hashish, and that appellant and Chevez had left after the shooting, "scared." The police had found the gun hidden in Beheler's back yard. They further admitted appellant was a "possible suspect" by

them and had appellant not gone to the sheriff's office voluntarily, a warrant would have been issued for his arrest.

It is clear from the record that the investigation had focused on appellant, among others, before the February 21st interview, and further, the police had sufficient information to constitute probable cause to arrest appellant. In fact, an "all-points" bulletin had already been put out for Wilbanks.

At the interview appellant told the police that they, the four suspects, intended to rob the victim of her hashish, and this was why he obtained his father's gun and gave it to Wilbanks. And yet, even at this point during the interview, the police did not Mirandize appellant.

As discussed above, the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody"

issue. However, upon the above facts, it is significant and entitled to great weight.

(3) Whether The Indicia Of Arrest Were Present.

Appellant and Chavez were interviewed in a small interroation room at the police station. Two police officers were present. Appellant was not told he was not in custody or that he was free to leave when he wanted. However, when he gave the second statement after he was arrested and Mirandized, he was asked if he agreed with the statement "You were not in custody at that time." Appellant replied, "That's right." Appellant and Chevez were not arrested at the end of their interview. In fact, the officers furnished them transportation home. However, Chavez and appellant were specifically told not to leave town. In People v. White, supra, 69 Cal.2d 751, the police officer admitted that he did not intend to permit the

defendant to leave the police station without explaining the evidence. On the other hand, in the instant case, Chavez and appellant were permitted to leave the police station following the first interview. Their friend, Beheler, had also given a statement to the police and was permitted to leave. In addition, there was testimony that Chavez and appellant felt they would be able to leave after their interview as well. On balance, and giving substantial weight to appellant's belief at the time that he was not in custody and the fact that he was not arrested at the end of the first interview, we conclude that the indicia of arrest were not present on February 21st.

(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be

deemed to be in custody pursuant to Miranda. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.)

In the instant case the interrogation of appellant on February 21, 1980, was designed to produce incriminating responses. Before the officers interrogated appellant they knew he was involved in the attempted robbery and/or homicide of the victim. At the beginning of the interview the police immediately began to ask appellant questions regarding the incident. It is apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. For example, at one point during the interview appellant told the officers that he loaned his gun to Danny Wilbanks because he wanted to do some "target practice."

The police officers immediately seized on this and asked appellant, "Well, Jerry Beheler told us that, that the intention of him going over there was to rob her." Appellant's response was, Yeah, yeah, yeah." The officers asked, "That's why he got the gun from you?" Appellant replied, "Yeah, yeah." Continuing, the officers asked, "So he got the gun from you and then you guys all got in the car, went down to the liquor store . . ." Appellant responded, "Yeah." "And Danny's intent was to rob her of her hash?" Appellant responded, "Yeah, just, just, yeah, just to get her hash and that's it."

We conclude that when the police confronted appellant with the evidence they had received from Jerry Beheler this was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra. (See People v. White, supra,

69 Cal.2d 751, 760-761.)

As previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595. In the instant case there appears to be no conflicting testimony. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude, from our independent review of the record, that the respondent has not met its burden of establishing the voluntariness of appellant's statement beyond a reasonable doubt. Further, we conclude the incriminating statements from the February 21st interview should have been suppressed by the trial court.

Almost immediately after the shooting here, the police identified the four suspects and interviewed Beheler. He named all the other coparticipants. Based on Beheler's statement, an "all-points" bulletin was immediately put out on Wilbanks and the police immediately went in search of appellant to question him. At the time of the February 21st interview, they had "focused" upon appellant and the others and had probable cause to arrest them. Yet, appellant was not then Mirandized. In the course of the interrogation, by artful questioning and confrontation with Wilbank's statements, appellant confessed to felony murder. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession

is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.)

In sum, we hold that appellant was in custody during his February 21st interrogation. His statements at this interrogation were wrongfully admitted because he was not advised of his Miranda rights prior to the interview and, as stated above, the wrongful introduction of a confession is reversible error, per se.

II.

Appellant's last contention on appeal is that the trial court erred in failing to instruct the jury in the law of conspiracy. In the instant case it was the prosecution's theory that appellant was an aider and abetter during the attempted commission of the robbery and therefore was liable for the victim's murder on a felony murder theory. It was appellant's theory that the victim's death resulted

from the independent act of a coconspirator.

There is no merit to this argument.

After argument by both sides, the court ruled that it would not give conspiracy instructions. The court apparently felt that since there was no evidence whatsoever that appellant withdrew or abandoned his intent to rob, conspiracy instructions were not mandated.

The court gave CALJIC No. 8127--first degree felony murder--aider and abetter, to the jury. This instruction reads as follows:

> "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of [robbery], all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

In addition, the court gave a special instruction submitted by appellant. This instruction was very similar to CALJIC No. 8.26--first degree felony murder in pursuance of a conspiracy. This special instruction read as follows:

> "If a human being is killed by anyone of several persons engaged in the perpetration of, or attempt to perpetrate the crime of robbery and if the killing is done in furtherance of a common design to commit such crime or if the killing is a natural and reasonable or probable consequence of any act knowingly aided or encouraged by the defendant, then all such persons so jointly engaged are guilty of murder of the first degree whether the killing is intentional, unintentional, or accidental."

The court also gave a special instruction offered by the People. This special instruction read as follows:

> "'A killing' 'in the perpetration of' a robbery attempt need not have been committed for the purpose of perpetrating the robbery; it is sufficient that the two acts, that is, the robbery attempt and the

killing, be part of one continuous transaction. If such is the case, then the killing so committed constitutes a murder in the first degree."

This language comes from People v. Johnson (1972) 28 Cal.App.3d 653, 658. The court also gave CALJIC No. 8.21, first degree felony murder. This instruction reads as follows:

"The unlawful killing of a human being, whether intentional, unintentional, or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there is in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery in the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

Appellant contends that his special instruction which contained some of the concepts contained in the conspiracy instructions was negated by the fact that the court also gave CALJIC No. 8.21 and CALJIC No. 8.27, supra. Appellant contends

that "It would seem that with the giving of these conflicting instructions the jurors would be thoroughly confused as to the state of the law."

Appellant seeks to rely on the testimony that he repeatedly said he did not want Danny Wilbanks to use the gun on the victim of the robbery, to absolve his responsibility in the death of the victim. However, there was uncontradicted testimony appellant participated in the planning of the robbery, supplied the lethal weapon to his coparticipant, accompanied his coparticipants to the scene of the crime, and further aided and abetted the crime by assisting in the escape and the disposal of the gun and bullets. While there is evidence appellant did not want Danny Wilbanks to fire the gun, there was no testimony whatsoever appellant ever intended to withdraw from the

underlying crime of robbery. Thus, appellant's contention cannot stand. In addition, appellant's argument that he was precluded from arguing withdrawal is negated by the fact that the court in the instant case gave CALJIC No. 3.02--termination of liability for aiders and abetters. This instruction reads as follows:

> "One who has aided and abetted the commission of a crime, with knowledge of the unlawful purpose of the perpetrator of a crime, may end his responsibility for the crime by notifying the other party or parties of whom he has knowledge of his intention to withdraw from the commission of the crime and by doing everything in his power to prevent its commission."

Thus, appellant's argument fails and the trial court was entirely correct in refusing to instruct the jury on the law of conspiracy.

- - -

- - -

For the reasons previously stated, the judgment is reversed and remanded for new trial.

MARTIN
J.*

WE CONCUR:

ZENOVICH
Acting P.J.

HANSON (P.D.)
J.

*Assigned by the Chairperson of the Judicial Council.

APPENDIX B

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIFTH APPELLATE DISTRICT

THE PEOPLE, ... Plaintiff and Respondent,	5 Crim. No. 5181
vs.	(Super. Ct. No. 20967)
ROSCOE HOWARD, JR., ... Defendant and Appellant.	

BY THE COURT

The Petition for Rehearing filed herein by Respondent is denied.

Dated AUG - 5 1982 .....

I CONCUR:

ZENOVICH Acting P.J.

HANSON (P.D.) J.

APPENDIX C

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

.....5th.....District Division....,....Crim. No. 5181.....

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

PEOPLE

v.

ROSCOE HOWARD, JR.

Respondent's petition for hearing DENIED.

BIRD
Chief Justice

Supreme Court filed Sep 29 1982

I, LAURENCE P. GILL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court as shown by the records of my office.

Witness my hand and the seal of the Court this

_____day of OCT 7 1982 A.D. 19___ Clerk

By J. ROSSI
Deputy Clerk

APPENDIX D

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

82 OCT 4 A10:37

ENTERED 186

ROSCOE HOWARD, JR.,

Defendant and Appellant.

5 Crim. No. 5181
Superior Court No. 20967

REMITTITUR

APPEAL from the judgment of the Superior Court of Kern County. WALTER OSBORN, JR., Judgment: September 22, 1980.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California, for the Fifth Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on July 16, 1982, and that this

opinion or decision has now become final.

WITNESS my hand and the seal of the
Court affixed at my office this
1st day of October, 1982.

KEVIN A. SWANSON, Clerk

By

Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE,	) 5 Crim.
	) No. 5181
Plaintiff and Respondent,	)
	) (Super. Ct.
v.	) No. 20967)
	)
ROSCOE HOWARD, JR.,	) O P I N I O N
	)
Defendant and Appellant.	)
	)

APPEAL from a judgment of the Superior Court of Kern County, Walter Osborn, Jr., Judge. Reversed.

Chain, Younger, Jameson, Lemucchi, Busacca & Noriega, James E. Noriega, and Eugene R. Lorenz, for Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Arnold O. Overoye, Assistant Attorney General, Roger E. Venturi and Ward A. Campbell, Deputy Attorneys General, for Plaintiff and Respondent.

--ooOoo--

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664/211 and 187).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. ROSCOE HOWARD, JR., Defendant and Appellant.	5 Crim. No. 5181 No. 20967 82 OCT p2:04 NOTICE OF FILING

TO: OFFICE OF THE ATTORNEY GENERAL
555 Capitol Mall, Suite 350
Sacramento, CA 95814

DISTRICT ATTORNEY
1215 Truxtun Avenue
Bakersfield, CA 93301
Attn: Pete Warmerdam, Deputy

CHAIN, YOUNGER, JAMESON, LEMUCCHI,
BUSACCA & NORIEGA
Attorneys at Law
1128 Truxtun Avenue
Bakersfield, CA 93301

EUGENE R. LORENZ
Attorney at Law
1227 California Avenue
Bakersfield, CA 93304

NOTICE OF APPEAL ABANDONMENT OF APPEAL

ORDER OF DISTRICT COURT OF APPEAL

X REMITTITUR ON APPEAL ENTERED 187
(see attached)

was filed in this office on the 4th day of October, 1982

DATED: October 5, 1982

GALE S. ENSTAD
County Clerk and ex Officio Clerk
of the Superior Court

By ....., Deputy
C. S. Ring

DECLARATION OF MAILING

On the date stated below, I mailed (by first-class mail, postage prepaid) true copies of this Notice of Filing to the persons entitled thereto, addressed as shown above.

GALE S. ENSTAD
County Clerk and ex Officio Clerk
of the Superior Court

By C. S. RING....., Deputy
C. S. Ring

Dated: October 5, 1982.....

Clerk 580 2170 AP-2(IM 4-79)